1996

State of Utah v. Scott Bowman : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 960372-CA
v.	:	
SCOTT BOWMAN,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR FAILURE TO RESPOND TO AN OFFICER'S SIGNAL TO STOP, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6.13.5 (1995), AND LICENSE PLATE AND REGISTRATION CARD VIOLATION, A CLASS C MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 41-1A-1305(5) (1993), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE WILLIAM A. THORNE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6.13.5 (1995), and license plate and registration card violation, a class C misdemeanor, in violation of Utah Code Ann. § 41-1a-1305(5) (1993), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable William A. Thorne, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did the court properly determine that the prosecutor's peremptory strikes against two jurors was not racially motivated? Since this issue presents a question of fact, based on the credibility of the party making the strike, the trial court's decision "will not be set aside unless it is clearly erroneous." State v. Merrill, 928 P.2d 401, 403 (Utah App. 1996) (citing

State v. Higginbotham, 917 P.2d 545, 548 (Utah 1996)).

2. Was the trial court correct in refusing to give an instruction limiting the jury's consideration of evidence for impeachment value only when the same evidence was admitted to prove defendant's guilt in the State's case-in-chief without objection? Whether a curative instruction is required in a particular case is matter of trial court discretion. State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990).

3. Did defendant invite error by initiating an improper attack on the prosecutor's reference to defendant's failure to call a witness to testify? This is uniquely a question of appellate court discretion. As a threshold question, this Court must decide whether defendant preserved his claim that the prosecutor improperly shifted the burden of proof by referring to defendant's failure to call the witness. An objection to the evidence must be specific, clear and on the record, otherwise the issue will not be considered on appeal. State v. Larsen, 828 P.2d 487, 495 (Utah App. 1992), aff'd, 865 P.2d 1355 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Fourteenth Amendment

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Rules of Evidence, Rule 105

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

STATEMENT OF THE CASE

Defendant, Scott Bowman, was charged with failure to respond to an officer's signal to stop (Count I) and license plate and registration card violation (Count II) (R. 7-9). Following a jury trial, defendant was convicted on both counts (R. 67-68). The trial court sentenced defendant to concurrent terms of zero-to-five years and three months on counts I and II, respectively, but suspended sentence and placed defendant on probation for twenty-four months (R. 94-96).

STATEMENT OF THE FACTS

The Criminal Case

At about 11:45 p.m. on August 5, 1995, Salt Lake County Deputy Sheriff Ann Cardon was headed north on 20th East at the intersection of 3300 South (R. 140). As the light turned green in her direction, she saw a man on a motorcycle, headed east on 3300 South, accelerate through the intersection (R. 141, 163). At the same time, the rider turned towards Deputy Cardon, showing a shocked and surprised expression on his face (R. 141). Deputy Cardon's headlights and the street lights on all corners were on (R. 142). From a distance of about 20 feet, Deputy Cardon saw

that the rider was a Caucasian man with dark hair of average length and a moustache, wearing a tank top and shorts, riding a brown motorcycle without license plates (R. 143, 156, 164-66).

The rider then sped up rapidly, turning south on 23rd East (R. 142-45). Deputy Cardon turned on her overhead lights and sirens (R. 144). Almost catching up with the fleeing rider, she saw him turn onto a small street on the north side of a restaurant (R. 145). Knowing the area quite well and expecting that the rider would come around the other side of the restaurant, Deputy Cardon positioned her patrol car to block the end of the street on the south side of the building (R. 146). As expected, the rider came directly at her and, although almost tipping the motorcycle over, managed to maneuver the motorcycle past the patrol car, apparently hitting it with his foot as he drove by (R. 146-49). Deputy Cardon got another good view of the rider for about five to ten seconds at this point (R. 147-48, 169).

The rider then proceeded on the west sidewalk of 23rd East until he reached 33rd South, where he entered the street and continued west (R. 150-51). In pursuit at seventy miles per hour, Deputy Cardon nonetheless failed to catch up with and lost sight of the rider, whom she estimated was traveling at more than ninety miles per hour (R. 151). Deputy Cardon broadcast a description of the rider as a dark-haired Caucasian male wearing

a tank top and short pants, riding a brown motorcycle (R. 192).

While cruising the area, Deputy Cardon was approached by Kevin Mitchell in a parking lot (R. 152). Mitchell said that he witnessed the chase, knew the rider, "Scotty" Bowman, and could provide the names and addresses of the defendant and his parents (R. 152, 172). On that information, Deputy Cardon and other officers went to defendant's parents' house, but did not find defendant (R. 153-54).

About thirty to forty minutes after first encountering defendant, and after definitely ruling out another suspect found near 33rd South and 6th East, Deputy Cardon rejoined the other officers at the other address given to her by Mitchell (R. 154-55, 157, 186). This address was above the restaurant on the same small street in which defendant had earlier tried to elude Deputy Cardon (R. 154, 184). Before Deputy Cardon arrived, Deputy Lenny Bruno had already located a brown motorcycle, the engine of which was too hot to touch, and interviewed defendant, who matched the description and was wearing the same style of clothes as that broadcast by Deputy Cardon (R. 192-94). When Deputy Cardon arrived, she immediately and unhesitatingly recognized defendant as the rider she had been pursuing and the motorcycle was the one she had earlier seen defendant riding (R. 156-57, 177, 185). The motorcycle was missing license plates and registration sticker (R. 156, 198).

Defendant, admittedly intoxicated and having difficulty in balancing himself, first told Deputy Bruno that he had been home all night (R. 178-79, 196, 199, 206, 219). Shortly afterward, defendant said that he had driven his car instead of his motorcycle (R. 197). Deputy Bruno felt the car's engine and found it "extremely cold" (R. 197). Defendant also told Deputy Bruno that no one had ridden his motorcycle that night.

Following his arrest, defendant talked randomly and incessantly during transport to the jail, alternately denying that he had done anything and then expressing regret that he had caused problems (R. 158, 241-45).

Defendant testified and acknowledged owning the two-tone brown motorcycle seized, which was neither licensed nor registered (R. 216-18). Although he denied having ridden the motorcycle that night, he admitted that no one else had the keys to the motorcycle, that he did not know why the motorcycle engine might be hot, and that he wore a tank top and shorts and had a moustache, as Deputy Cardon had observed (R. 219-20, 225-26). Defendant also suggested that Mitchell, a former roommate, fabricated his eyewitness identification because he was angry at defendant for having kicked him out of their apartment (R. 221).

Jury Selection

Prospective jurors completed background questionnaires, which were distributed to counsel (R. 114, 341). First the trial

court questioned the prospective jurors, after which both the prosecutor and defense counsel also briefly questioned them with regard to their questionnaire answers (R. 341-47). In response to the prosecutor's question about whether they would be unable to act fairly in spite of family or friends having been charged with a criminal offense, no juror responded (R. 341).

After certain prospective jurors were removed for cause, counsel each exercised their three peremptory challenges.[1] Pertinent to defendant's claim, the prosecutor used his first and second peremptory strikes to remove Ms. Frances Alires (juror number 16) and Ms. My Dang (juror number 9) (R. 69). Defense counsel used his third peremptory strike to remove Mr. Sudhir Nadkarni, a man of apparent Indian descent (R. 69, 369).

After the jury was sworn (R. 366),[2] defense counsel raised a Batson challenge against the prosecutor's strikes of Ms. Alires and Ms. Dang (R. 367). Counsel stated that Ms. Dang was

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[1] Due to the limited size of the prospective panel, counsel agreed to exercise only three of four allowed peremptory challenges (R. 359, 365).

[2] Court's have generally dismissed Batson claims made after the jury was sworn and venirepersons excused from the courtroom. See McCrory v. Henderson, 82 F.3d 1243, 1247 (2d Cir. 1996); United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993). However, because the trial court considered defendant's Batson claim even though presented after the stricken jurors had been excused and the panel sworn, the challenge appears to have been adequately preserved. See State v. Matsamas, 808 P.2d 1048, 1053 (Utah 1991) (holding that because trial judge took evidence on and ruled upon a challenge to hearsay evidence at trial--even though the objection was not timely raised--the issue was preserved for appeal).

obviously of Asian descent and Ms. Alires was a woman of Hispanic descent and that there was nothing negative on the questionnaires of either woman, attached at Addendum A (R. 367). Because the prosecutor had not individually questioned these two prospective jurors, defense counsel claimed he had established a prima facie case of discrimination (R. 368).

The prosecutor responded that he did not strike Ms. Dang based on race, but rather because he was concerned about her command of English (R. 368). He struck Ms. Alires because he had another defendant in a pending case whose relatives had improperly received a lot of optical goods, and he feared there might be a connection between Ms. Alires and that defendant (R. 368). The prosecutor specifically noted that he did not even know whether she belonged to a minority (R. 368). Defense counsel pointed out Ms. Alires' questionnaire indicated that none of her family had ever been charged with an offense, and that the prosecutor had not struck others on the panel who had similarly answered (R. 114, 368-69).

The trial court denied the challenge:

> I think the case law makes fairly clear that the challenge at least has to pose race-neutral basis. It does not--if I remember part of the works of the Court, it doesn't have to be a good reason, it simply has to be a neutral reason.
>
> I will note for the record as well there is a person of obvious Indian descent who did remain and was not stricken [by the prosecutor].

(R. 369). After defense counsel informed the court that he had

stricken Mr. Nadkarni because of his ties to law enforcement, the prosecutor again asserted his belief that he did not recognize "Alires" as a minority name (R. 370). He further stated that it was an unusual name, one that he had not encountered in his fifteen years of practice and one which he remembered for that reason (R. 370).

Request for Limiting Instruction

During the State's case-in-chief, Deputy Cardon testified that, on the way to jail, defendant explained that he had led officers on a chase apparently because he was upset about his wife, who lived in Toronto, not allowing him see his children (R. 158). When defendant later took the stand, he denied being the person Deputy Cardon had chased and denied that he told officers he fled because he was upset with his wife (R. 222, 224, 227). The State then recalled Deputies Cardon and Bruno to rebut defendant's testimony (R. 234-44).

The trial court overruled defense counsel's objection that the above-referenced evidence had already been introduced in the State's case-in-chief, noting that the State was entitled to use rebuttal evidence to contradict defendant's preceding testimony (R. 235). The deputies' rebuttal (R. 234-44) went to the same statements of defendant that they reported in their direct examinations in the State's case-in-chief (R. 158, 209-10). Specifically, Deputy Bruno testified that defendant claimed his

wife, who lived in Toronto, Canada, would not let him see his children, that he was "acting out a life," and that he was a wild man (R. 235). Deputy Cardon reported substantially the same statements, including that defendant referred to himself as a "king" and that defendant had suggested that the deputies cite him and then release him and allow him to pay a fine (R. 241-44).

Defense counsel initially argued that because defendant's statements appeared to have been given without Miranda warnings[3] he was entitled to a curative instruction (R. 249). The prosecutor answered that the deputies' testimony was proper rebuttal for impeachment and that Miranda was not applicable because defendant's admissions were not in response to interrogation (R. 250). The trial court, without ruling on whether Miranda rights had been given, indicated that defendant's rambling admissions to Cardon might have been the result of Deputy Bruno's prior questioning (R. 250). After the prosecutor again argued that defendant's admissions were admissible impeachment evidence, defendant asked for an instruction limiting the jury's consideration of his post-arrest statements for impeachment purposes only (R. 250-51). The trial court refused

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[3] See Miranda v. Arizona, 384 U.S. 463, 86 S. Ct. 1602 (1966). The record is unclear as to whether defendant's Miranda rights were violated. Deputy Bruno did not read defendant his rights, but Officer Langley, present at the scene, might have (R. 239). Deputy Cardon's report does not indicate that she read defendant his rights (R. 242).

to give such an instruction, stating that (1) a limiting instruction would only draw the jury's attention to the issue, when the case really centered on Deputy Cardon's identification of defendant and it was thus not critical that such an instruction be given, and (2) the evidence was "admissible as it was presented" (R. 252).[4]

Challenge to Prosecutor's Rebuttal Comment

During closing argument, defense counsel argued that the jury should acquit defendant because the State had failed to call as a witness Kevin Mitchell, who first informed Deputy Cardon that defendant was the fleeing motorcyclist (R. 150, 272-73). Defendant argued that because Deputy Cardon was then "predisposed to identify defendant as the suspect, and because Mitchell's accosting Deputy Cardon was "odd," and there appeared to be "bad blood" between Mitchell and defendant, the State's failure to call Mitchell to testify amounted to the withholding of critical facts sufficient in itself to raise a reasonable doubt as to defendant's guilt (R. 272-74).

In rebuttal argument, the prosecutor stated:

> And so if Mr. Bowman -- or if [defense counsel] thinks [Mitchell's] such an important witness, although he has

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[4] Since defendant's request for a limiting instruction was brought up in the context of the deputies' rebuttal testimony, and the prosecutor argued that the deputies' testimony was presented at that point for impeachment, it would appear that the trial court found their testimony admissible "as it was presented [for rebuttal]" (R. 252).

> no responsibility to produce any evidence, he has every opportunity to bring him in and let you hear from him. So, if he wanted you to hear from him, he has that opportunity--

(R. 281). At this point, defense counsel interrupted, saying:

> Objection to that, Judge. Of course, [Mitchell's] listed as a prosecution witness on the police reports, and if I'd known he wasn't going to be here, I would have done that, but --

(R. 281). The trial court, clarifying that the prosecutor had simply remarked that if defense counsel had wished Mitchell to testify, counsel could have brought the witness in, overruled defendant's objection (R. 281). The prosecutor went on to state:

> So, if--if that's such a big deal to [defense counsel], he has every opportunity to bring in everybody he wants, he has the subpoena power of the Court and so he wants you to think, boy, that's a big flaw in the State's case.

(R. 281-82).

SUMMARY OF ARGUMENT

POINT I

Defendant, having conceded on appeal that the prosecutor's reasons for using peremptory strikes to remove Ms. Alires and Ms. Dang from the jury panel were facially neutral, also fails to show that the trial court's findings that the prosecutor did not act with discriminatory intent were clearly erroneous. The prosecutor struck Ms. Dang because he was concerned about her command of English. The videotape of voir dire displays Ms. Dang's timorous and inaudible responses, spoken in the manner of people uncomfortable with a foreign language, a view confirmed by her uncomprehending answers to the jury questionnaire. The

prosecutor struck Ms. Alires because he feared that she might be related to another defendant having the same surname in a pending case. The prosecutor did not recognize either the juror or her name to be Hispanic, a condition never established on the record. Any motivation to discriminate was undercut by the fact that defendant and Ms. Alires were of different races.

POINT II

Defendant cites no controlling authority requiring a trial court to give a limiting instruction in the circumstances of this case. First, the court never expressly ruled that defendant's statements had been taken in violation of Miranda, and so a limiting instruction distinguishing substantive from impeachment use was never warranted. Even if the deputies' rebuttal was offered only for impeachment, the court properly recognized that to instruct the jury from considering it substantively would only confuse it, since precisely the same evidence had been admitted during the State's case-in-chief without objection. In any case, because the clear purpose of the deputies' testimony was for impeachment only, and because there was substantial independent evidence of guilt, any error was harmless.

POINT III

Because defendant failed to adequately specify that his objection to the prosecutor's comment in closing argument concerned an alleged improper burden shifting, defendant failed

to preserve his claim. Considering the merits of defendant's claim, Utah case law has upheld substantially the same comments made by the prosecutor in this case. Defendant also invited any error in closing argument by initiating an attack to which the prosecutor merely responded in kind. Any error was harmless because defendant had himself already opened the door to the prosecutor's response, the trial court repeatedly instructed the jury on the State's burden of proof, and evidence of guilt was substantial.

ARGUMENT

POINT I

THE TRIAL COURT'S CONCLUSION THAT THE PROSECUTOR'S USE OF PEREMPTORY STRIKES AGAINST TWO JURORS WAS NOT RACED BASED WAS NOT CLEARLY ERRONEOUS

A. Introduction

Under Batson v. Kentucky and its progeny, parties may not discriminate against potential jurors by exercising peremptory challenges solely on the basis of race or gender. Batson, 476 U.S. 79, 90, 106 S. Ct. 1712, 1723 (1986); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 1430 (1994). At trial, defendant demanded that the prosecutor give a race-neutral reason, pursuant to Batson, for peremptorily striking potential jurors Alires and Dang (R. 367-68). In response, the prosecutor explained that he did not recognize Alires or her name as Hispanic, but thought she might be related to another

defendant in a pending case. He struck Dang because he was concerned about her command of the English language (R. 368). The trial court accepted the prosecutor's explanation as genuine and race-neutral and, accordingly, denied defendant's Batson challenge (R. 369). On appeal, defendant disputes the trial court's ruling, claiming that the trial court should not have accepted the prosecutor's reason because it was clearly a pretext for purposeful discrimination. Appellant's Br. at 10-11.

The United States Supreme Court has established how a trial court should approach a Batson challenge:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

State v. Higginbotham, 917 P.2d 545, 547 (Utah 1996)(emphasis added) (citing Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 1771 (1995) (per curiam) .

Because the prosecutor gave his reasons for striking the jurors (though he also challenged defendant's claim of Alires' ethnicity) and because the trial court ruled on the ultimate issue of discriminatory intent without first considering whether defendant had carried his initial burden, the issue of whether

defendant established a prima facie case has been waived.[5]

In like fashion and in recognition of the low standard now clearly promulgated by the Supreme Court, defendant appears to concede that the prosecutor's reasons for striking the prospective jurors were facially valid, thus satisfying the strike proponent's burden at the second step of the Batson analysis.[6] Appellant's Br. at 21-23.

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[5] See e.g., Merrill, 928 P.2d at 403 ("Where the proponent of the peremptory challenge fails to contest the sufficiency of the prima facie case at trial and merely provides a rebuttal explanation for the challenge, the issue of whether a prima facie case was established is waived.") (quoting Higginbotham, 917 P.2d at 547).

[6] The proponent of the challenged strike in a Batson case faces only a modest threshold in coming forward with a race-neutral reason for his strike (step 2):

> The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

Elem, 115 S. Ct. at 1171 (quoting Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 1866 (1991) (plurality opinion); id. at 374, 111 S. Ct. at 1874 (O'Connor, J., concurring in judgment).

The prosecutor struck Ms. Alires because he suspected that she might be related to another defendant whose case was pending. He struck Ms. Dang because he doubted her command of the English language. Those reasons are plainly facially valid and race-neutral, and therefore, adequate to satisfy the State's burden at the second step of the analysis.

B. Defendant Failed to Show that the Prosecutor's Peremptory Strikes were Motivated by Discriminatory Intent.

1. The Standard of Review

The third step in the Batson analysis requires the court to decide whether the Batson claimant has proved purposeful racial discrimination.[7] Higginbotham, 917 P.2d at 548; see also Elem, 115 S. Ct. at 1771 ("the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike"). "As this is a question of fact, turning on the credibility of the party making the strike, the trial court's decision 'will not be set aside unless it is clearly erroneous.'" Merrill, 928 P.2d at 403 (quoting Higginbotham, 917 P.2d at 548). In Hernandez, the Court explained the peculiar fact sensitivity of a Batson challenge:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror,

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[7] In Elem, the Court further explained Batson's admonition that "to rebut a prima facie case, the proponent of the strike 'must give a "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges,' and that the reason must be 'related to the particular case to be tried.'" Elem, 115 S. Ct. at 1771. Utah appellate court's have adopted the same standards for evaluating the strike proponent's race-neutral reasons, to wit: (1) neutral, (2) related to the case being tried, (3) clear and reasonably specific, and (4) legitimate. See Merrill, 928 P.2d at 403 (citing State v. Cantu, 778 P.2d 517, 518 (Utah 1989) ("Cantu II"). Because defendant challenges only the legitimacy of the prosecutor's reasons, this Court need not consider any other basis.

> evaluation of the prosecutor's state of mind based on demeanor and credibility lies '"peculiarly within a trial judge's province."'

Hernandez, 500 U.S. at 365, 111 S. Ct. at 1869 (citations omitted). Because of this unusual fact sensitivity, the trial court's findings are entitled to great deference, see id., and the appellate court will accept the trial court's conclusion "'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.'" Id. at 368, 111 S. Ct. at 1871 (citations omitted); see also State v. Walker, 743 P.2d 191, 192 (Utah 1987) (the clearly erroneous standard requires great deference to the trial court's findings).[8]

Further, "[t]o show clear error, the appellant must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." Higginbotham, 917 P.2d at 548 (citations omitted).

In this case the trial court stated simply and without

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[8] Defendant mistakenly argues that Utah appellate courts have taken a "more refined" approach in applying the deferential standard, instead considering the issue as a mixed question of fact and law where the prosecutor's reasons are uniquely factual. Appellant's Br. at 24. In support he cites only on Cantu II. However, in that case the court specifically stated that it was applying the clearly erroneous standard. Cantu, 778 P.2d at 518. That the court reversed only means that it found the trial court's findings inadequate under the clearly erroneous standard.

elaboration that the prosecutor's reason for striking the jurors was race-neutral (R. 369). While the court did not explicitly state, for example, that it found the prosecutor's reasons supported by the record or that the prosecutor appeared credible to the court, the record supports those implicit findings,[9] and defendant has failed to show they were clearly erroneous as to each prospective juror removed by the prosecutor's peremptory strikes.

2. My Dang

The prosecutor struck Ms. Dang because he had doubts about her command of the English language and did not wish to embarrass her by further questioning her (R. 368; Videotape 11:13:25-48 A.M.). Although defendant claims to have marshaled all the evidence in support of the prosecutor's reasons, he has neglected critical bases for the prosecutor's assessment of this juror. First, Ms. Dang's questionnaire, attached at Addendum A, indicates a serious lack of comprehension of the language (R. 114). In answer to the "education years completed," Ms. Dang first wrote, "No," and then apparently changed her response to "1993," also an inappropriate answer. Similarly, in response to "marital status," she first wrote an answer that, though

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[9] See State v. Ramirez, 817 P.2d 774, 787-88 n.6 (Utah 1991) (the appellate court "upholds the trial court even if it failed to make findings on the record whenever it would be reasonable to assume that the court actually made such findings").

difficult to discern, does not appear responsive, i.e., it is not "married," or "single," or "divorced." Ms. Dang then overwrote her response with the word "female," also an inappropriate response. Finally, in the space left for "number of children," Ms. Dang wrote "0," but then wrote "20," in the space provided for children's ages (R. 114).

It is evident that Ms. Dang's questionnaire was a sufficient basis for the prosecutor's suspicions about her language ability. These suspicions were confirmed by her responses to the trial court's initial voir dire. The record indicates that Ms. Dang's responses were inaudible (R. 330). Defendant suggests that this merely indicates that Ms. Dang was soft-spoken. Appellant's Br. at 30. However, the videotape of the proceedings plainly indicates that Ms. Dang was an unusually "soft-spoken" person and that when defense counsel asked her to speak up, she did not audibly change her voice (Videotape 10:19:25-59 A.M.). From this refusal to answer audibly, even when specifically requested to do so, the prosecutor could quite reasonably have inferred that Ms. Dang felt uncomfortable in publicly expressing herself in English, in the manner of people who feel inadequate speaking a foreign language. Indeed, the prosecutor's feeling that Ms. Dang would feel embarrassed by being singled out for voir dire on her language skills, and his decision not to further question her, shows genuine sensitivity for Ms. Dang's feelings, rather than a

wish to discriminate against her. Ms. Dang's timorous responses alone constitute an adequate basis for the prosecutor's striking her and the court's finding that the prosecutor's reason was not racially motivated. See Higginbotham, 917 P.2d at 548 (body language alone is a sufficient basis to support the exercise of a peremptory challenge); State v. Macial, 854 P.2d 543, 547 (Utah App.), cert. denied, 862 P.2d 1356 (Utah 1993) (peremptory challenge upheld where juror was unwilling to respond without apparent reason). In this case, the prosecutor's reasons were based not only on the juror's demonstrated reluctance to express herself in the English language, but also on her demonstrated inability to understand it. Although the trial court did not make explicit findings on these points, the court plainly recognized the validity of the prosecutor's assessment in finding his reasons for striking Ms. Dang race-neutral, and this Court should similarly find that the trial court's conclusion is not clearly erroneous.

3. Frances Alires

Defendant principally challenges the prosecutor's reasons for striking Ms. Alires because her questionnaire provides no grounds and, contrary to the prosecutor's stated suspicion, does not indicate that she or any of her family members had been charged with an offense, an assertion the prosecutor evidently

doubted but did explore with further questioning.[10] Further, defendant argues that since the prosecutor did not strike other potential jurors who similarly answered the family background question and because the prosecutor would likely recognize an Hispanic name, the prosecutor's reasons must be pretextual. Appellant's Br. at 20-23, 26-29.[11]

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[10] In support, defendant cites from Cantu II, several additional factors "that may cast doubt upon the legitimacy of a purportedly race-neutral explanation." Cantu, 778 P.2d at 518. These include:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror [sic] who were not challenged.

Id. at 518-19 (quoting State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873 (1988)); accord State v. Span, 819 P.2d 329, 342, 343 (Utah 1991).

[11] In further support of his claim, defendant also states that the trial court struck for cause each of the jurors who indicated that he/she or a family member had been charged with an offense. Appellant's Br. at 22 n.4. To the extent that claim suggests that an affirmative response to the family background question was a sufficient basis for removal for cause, and that the prosecutor's failure to pursue that determination with respect to Ms. Alires is further indication of race motivated strike, the claim is doubtful. Four prospective jurors, Ms. Laurie Packard, Richard Acey, Victor Coloroso, and George Maxwell, answered the family background question affirmatively (R. 114). However, the court's removal of those jurors for cause was most likely based on other reasons which, unlike the family background issue, were the focus of express questioning by the court: Ms. Packard indicated that she could not be impartial toward the prosecution based on past experience with a "dishonest" police officer (R. 351); Mr. Acey was predisposed to consider defendant guilty by defendant's merely being in court (R. 350, 353-54); Mr. Coloroso indicated a bias in favor of police deputies and did not believe that he could give defendant

While the prosecutor's failure to question Ms. Alires is somewhat compromising, defendant's assertions are, in part, purely conjectural and, in sum, fail show that the prosecutor's strike was race motivated. The failure to question a prospective juror about a lingering doubt undispelled on the record is not fatal to a finding that the prosecutor's reasons for striking are race-neutral. See State v. Harrison, 805 P.2d 769, 777 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991) (upholding alleged race motivated peremptory strike in spite of "suspiciously sparse" questioning). While Ms. Alires denied that she or any family member had been convicted of an offense, the prosecutor was troubled by the fact that he was currently prosecuting another defendant of the same name in Salt Lake County for having given free eyeglasses to her relatives (R. 368). In response to defendant's retort that he had not struck juror "Smith" and others on the panel, the prosecutor noted that he considered "Alires" an unusual name, one he had never in fifteen years of legal practice encountered before (R. 369-70). Unlike those with more common names on the panel, the prosecutor suggested, Ms. Alires' name seemed unique and, therefore, memorable (R. 370). While he candidly acknowledged that he did not further question Ms. Alires (R. 368), the prosecutor might well have thought that

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the benefit of a doubt (R. 354); and Mr. Maxwell knew defense counsel socially (R. 336-37).

Ms. Alires answered honestly, but might later discover that a relative had been charged, resulting in a mistrial. Alternatively, the prosecutor might have believed Ms. Alires to be withholding an embarrassing fact, one that she would simply deny during questioning. See Higginbotham, 917 P.2d at 547 (upholding peremptory strike even though trial court denied defense request for follow-up questions about the prospective juror's perceived hostility on the assumption that the juror would deny any such feelings). In any case, the prosecutor evidently felt that he need not take the risk in accepting a prospective juror who might be either unwilling or unable to then disclose her disability. See Merrill, 928 P.2d at 404 (approving the strike of a prospective juror who prosecutor was unwilling to risk might be adverse to law enforcement).

As noted above, the prosecutor's substantive rebuttal to defendant's Batson claim, coupled with the trial court's ruling on the ultimate issue of discrimination, rendered defendant's burden to make a prima facie case moot. However, notwithstanding the prosecutor's waiver, the trial court was entitled to consider either that Ms. Alires was not a member of a minority or, even if she was, that the prosecutor honestly did not perceive her as Hispanic.[12] In Harrison, this Court found that the prosecutor's

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[12] In this case the prosecutor did not "merely" provide a rebuttal explanation to defendant's Batson challenge, but also contested the sufficiency of the prima facie case, asserting that

rebuttal explanation, that he liked the Hispanic potential female jurors less that the other potential female jurors, was legally inadequate. Harrison, 805 P.2d at 778. However, the Court noted that it was "not compelled to find clear error in the trial court's conclusion that the peremptory challenges were not racially motivated," because, although the State had waived the question of the prima facie case, it was proper for trial court to consider all the facts and circumstances, including the absence of a pattern of minority strikes. Id.

In this case defendant merely asserted that Ms. Alires was Hispanic (R. 367). The prosecutor twice denied his recognition of Ms. Alires' minority. On appeal defendant suggests that because the prosecutor in this case is the same prosecutor in Cantu II that agreed to select a potential Hispanic juror from a master jury list, the prosecutor must be knowledgeable about Hispanic names, and was, therefore, misrepresenting his ignorance before the court. Appellant's Br. at 23 n.7. There is nothing in the record to support any part of this assertion. Moreover, even if the trial court was inclined to accept Ms. Alires as Hispanic, its ultimate finding of race-neutrality suggests that it at least believed the prosecutor on this point.

Finally, although unstated by the court, the fact that

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he neither perceived Ms. Alires to be an Hispanic or "Alires" to be an Hispanic name (R. 368, 370). See supra text accompanying note 5.

defendant and both Ms. Alires and Ms. Dang are of different races undercuts any claim of race discrimination. See Higginbotham, 917 P.2d at 547 (upholding finding of race-neutral peremptory challenge based in part on trial court's finding that because defendant was a Caucasian and the stricken juror an Hispanic, exclusion for race seemed remote); cf. Hernandez, 500 U.S. at 369-70, 111 S. Ct. at 1872 (upholding finding of race-neutral peremptory strike based, in part, on prosecutor's not knowing that prospective jurors were Latino and because same "ethnicity of victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury"); State v. Alvarez, 872 P.2d 450, 458 (Utah 1994) (same as to identity of juror and witness ethnicity).

Defendant concludes by comparing the prosecutor's performance in this case with that of the prosecutor in Cantu II. Appellant's Br. at 28. In that case, the prosecutor requested the trial court ask only a single question of the challenged juror after the prosecutor had already acknowledged that, out of animosity toward defense counsel, he would oppose any prospective juror defense counsel wanted. Cantu, 778 P.2d at 518-19. The supreme court found the peremptory strike discriminatory, based on the prosecutor's "desultory voir dire, uninvolved demeanor, and failure to pursue a studied or deliberate course of questioning regarding specific bias, together with his stated

reasons that the challenge was made in anger." Id. at 519. It is clear from the tenor of the opinion that a major reason for the supreme court's finding the peremptory strike discriminatory was the prosecutor's vindicative approach toward defense counsel's desiring a minority juror, and that his "desultory" question evidenced that discriminatory motive. Id.

The prosecutor's conduct and demeanor were demonstrably different in this case. Although only a single question was asked, unlike the prosecutor in Cantu II, the prosecutor had some basis for believing that Ms. Alires might be related to another defendant in a pending case. More importantly, the record nowhere suggests the prosecutor was angry at either Ms. Alires or defense counsel. In fact, the videotape evidences a forthright demeanor in the prosecutor's expressed ignorance of Ms. Alires ethnicity and his genuine concern about the possibility of her being related to a defendant in a pending case (Videotape 11:13:50-11:14:21 A.M., 11:16:12-36 A.M.).

The State acknowledges, as defendant points out, that the trial court partly relied on the prosecutor's not striking the last prospective minority juror in upholding the peremptory strikes, a basis which this Court found unpersuasive in State v. Pharris. Appellant's Br. at 27-28. However, this Court's reversal of the trial court's ruling in Pharris was based on far more egregious oversights than any displayed in this case. In

Pharris, the trial court did not even require that the prosecutor respond to the defendant's assertion of a prima facie case, and when the prosecutor did respond with respect to two of his minority challenges, the court foreclosed his having to respond to the third. State v. Pharris, 846 P.2d 454, 464 (Utah App.), cert. denied, 857 P.2d 948 (Utah 1993). More importantly, the trial court in Pharris found that because the defendant and the stricken jurors were of different races, the case was not even controlled by Batson, a determination this Court correctly rejected. Id. at 465.[13] Any oversights by the trial court in this case are trivial compared with those in Pharris.[14]

In sum, this Court should find that the prosecutor's peremptory strikes of Ms. Alires and Ms. Dang were not racially motivated and that the trial court's determination of race-neutrality was not clearly erroneous.

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[13] Pharris correctly cites Powers v. Ohio, 499 U.S. 400, 402, 111 S. Ct. 1364, 1366 (1991) for its holding that a criminal defendant may object to race-based exclusions of jurors removed by peremptory challenges "whether or not the defendant and the excluded juror share the same races." See Pharris, 846 P.2d at 465. Powers, however, nowhere suggests that a defendant's different ethnicity than that of the stricken juror may not undercut a claim of race discrimination, as suggested by Hernandez. Appellee's Br. at 26.

[14] Even if this Court should find that the court's findings are inadequate, they do not warrant reversal of defendant's conviction, as defendant suggests, but rather only reversal of the court's ruling with a remand for an evidentiary hearing on the race-neutrality of the prosecutor's peremptory strikes. See Pharris, 846 P.2d at 465 (remanding for an evidentiary hearing upon finding the trial court's determination of race-neutrality insufficient or erroneous).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE A CAUTIONARY INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF REBUTTAL TESTIMONY TO ITS IMPEACHMENT VALUE UNDER THE CIRCUMSTANCES OF THE CASE.

Defendant argues that on rebuttal the prosecution elicited from Deputies Bruno and Cardon that, in offering reasons for his behavior, to wit: he was upset about being denied visitation with his child, defendant had effectively made admissions of guilt. Wishing to avoid a mid-trial suppression hearing on whether defendant's admissions were given in violation of Miranda, the trial court allowed the admissions in only for impeachment. Since the statements were admissible only for impeachment, defendant argues that the trial court erred in refusing his request for an appropriate limiting instruction. Appellant's Br. at 8-9, 32. Defendant's argument fails because the trial court reasonably exercised its discretion in refusing to give the requested instruction under the circumstances of the case and because any error was harmless, emphatically demonstrated by defendant's failure, either at trial or on appeal, to challenge the admissibility of the deputies' testimony in the State's case-in-chief.[15]

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[15] The transcript of counsel's argument and the trial court's ruling (R. 249-52) is attached at Addendum B.

A. The Trial Court Reasonably Exercised its Discretion in Denying Defendant's Request for a Cautionary Instruction.

1. The Trial Court has Broad Discretion.

Utah's trial courts have generally been given broad discretion in the area of jury instructions. See, e.g., State v. Aly, 782 P.2d 549, 550 (Utah App. 1989) (precise working and specificity of jury instructions is left to sound discretion of trial court); State v. Schreuder, 726 P.2d 1215, 1221 (Utah 1986) (refusal to give instruction regarding specific factor bearing on credibility was within trial court's discretion). Similarly, the question of whether to give a limiting instruction is often left up to the complete discretion of the trial judge. See, e.g., State v. Brooks, 638 P.2d 537, 542 (Utah 1981) (no abuse of trial court's discretion to refuse cautionary instruction on potential dangers of substituting taped preliminary testimony for live trial witnesses); State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990) (trial court has discretion to determine whether curative instruction is required in a particular case).

2. Neither Federal Nor State Cases Cited by Defendant Support His Contention that the Trial Court was Required to Give a Limiting Instruction.

Defendant particularly relies on Harris v. New York, wherein the United States Supreme Court held that evidence obtained in violation of Miranda v. Arizona, while inadmissible against an accused in the prosecution's case-in-chief, is admissible for impeachment purposes to attack a defendant's credibility. See

Harris, 401 U.S. 222, 224-25, 91 S. Ct. 643, 645 (1971); accord Michigan v. Harvey, 494 U.S. 344, 351, 110 S. Ct. 1176, 1180 (1990); Oregon v. Hass, 420 U.S. 714, 723, 95 S. Ct. 1215, 1221 (1975); State v. Troyer, 910 P.2d 1182, 1190 (Utah 1995). "If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately.'" Id. (quoting Harris, 401 U.S. at 225, 91 S. Ct. at 645). The Supreme Court has "consistently rejected arguments that would allow a defendant to 'turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'" Id. (quotations omitted).

Defendant correctly notes that the trial court gave the jury a limiting instruction in both Harris and Hass.[16] See Hass, 420 U.S. at 717, 95 S. Ct. at 1218; Harris, 401 U.S. at 223, 91 S. Ct. at 644. However, that fact was incidental to the Supreme Court's primary focus, namely, determining whether tainted evidence was admissible for any purpose, and, based on the absence of any reference to the significance of the limiting instruction from the Court's analysis, was irrelevant to its holdings. See Hass, 420 U.S. at 721-24, 95 S. Ct. at 1220-21; Harris, 401 U.S. at 228-30, 91 S. Ct. at 647-48. Therefore,

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[16] Harvey was a bench trial; therefore, no limiting instruction was given. 494 U.S. at 347, 110 S. Ct. at 1178.

although limiting instructions were given in both Harris and Hass, the Court did not require trial courts to give a cautionary instruction limiting the jury's consideration of otherwise tainted evidence to its impeachment value only.[17]

Defendant similarly suggests that both State v. Gardner, 789 P.2d 273 (Utah 1989) and State v. Ayala, 762 P.2d 1107 (Utah App. 1988), support his entitlement to a limiting instruction following his request. Appellant's Br. at 33-34. However, this assumption too is purely speculative. In Ayala, the court recognized that statements made in violation of Miranda were admissible "to attack the credibility of defendant's trial testimony," relying, in part, on Harris. 762 P.2d 1107, 1113 (Utah App. 1988), cert. denied, 773 P.2d 45 (Utah 1989). The Court, however, never reached defendant's claim that he was entitled to a limiting instruction because defendant did not request it. See id. Thus, Ayala is merely suggestive of defendant's claim.

The court's analysis in Gardner similarly provides little

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[17] Defendant also relies on United States v. Martin, 63 F.3d 1422, 1429 (7th Cir. 1995), for the proposition that a limiting instruction should always be given when requested and when testimony comes in for impeachment purposes. However, Martin only holds that a limiting instruction "should typically be given when requested." Id. (emphasis added). The Seventh Circuit failed to define what would constitute a "typical" case and, by using the word "typically," implied trial courts are still afforded some measure of discretion to decide if a limiting instruction is warranted in a particular case.

support for defendant's claim since no limiting instruction was requested. See 789 P.2d 273, 282 (Utah 1989), cert. denied, 494 U.S. 1090 (1990). In Gardner, defendant argued that the trial court's failure to instruct the jurors as to the limited use they could make of arguably tainted statements was "manifest error," requiring reversal of his conviction. Id. The court disagreed, finding principally that the evidence was offered on rebuttal only for the limited purpose of impeaching defendant's testimony. See id. "Thus, when the evidence was received, the jury was faced only with deciding whether the rebuttal witness or defendant was telling the truth." Id. The court concluded: "Given the nature of the testimony, the State's objective in offering it, and the manner in which it was received into evidence, we cannot say that there was manifest error in the failure of the trial court to give a limiting instruction sua sponte." Id. Thus, while Gardner too is suggestive, it does not plainly support defendant's position. Indeed, considering the limited purpose for which the evidence in this case was admittedly offered (R. 233, 250-51), Gardner equally supports a finding that, at the very least, there was no manifest error in the trial court's refusal to give a limiting instruction.

3. The Advisory Committee Notes to Rule 105 of the Utah Rules of Evidence Recognize that Cautionary Instructions Often Fail to Limit the Jury's Consideration of Some Issues.

Defendant argues that the trial court was required to

provide a limiting instruction to the jury under rule 105, Utah Rules of Evidence. Rule 105 provides: "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Utah R. Evid. 105. In support of the rule's directive, defendant cites several cases which he asserts apply a mandatory requirement to give a cautionary instruction in circumstances comparable to those in this case. Appellant's Br. at 34-35. However, neither the rule nor the cited authority are applicable to this case.

First, the advisory committee notes add "the caveat that a limiting instruction may be illusory at best, particularly in a complex trial or one in which the evidence substantially consists of inferences, presumptions or circumstantial evidence;" and further, "[t]he matter is addressed to the discretion of the court." Utah R. Evid. 105 advisory committee note.

In this case, although the trial court appears to have admitted the deputies' testimony especially for impeachment, the trial court never ruled that the deputies had interrogated defendant without giving Miranda warnings, and therefore, it is not clear that the trial court's admission contemplated that the jury could not consider the evidence substantively (R. 250-52). Therefore, the restrictive language of rule 105 was not

triggered.

However, even assuming that the court admitted the deputies' testimony for impeachment only, the court recognized the problem with giving the jury a limiting instruction: it might cause the jury to focus on defendant's inconsistent statements and, instead of minimizing prejudice to the defendant, it might actually be more prejudicial because the jury might give that evidence even greater substantive weight, given their hearing of the same evidence during the State's case-in chief. See Jackson v. Denno, 378 U.S. 368, 389 n.15, 84 S. Ct. 1774, 1787 n.15 (1964) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be an unmitigated fiction.") (quoting Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949) (Jackson, J., concurring) (citations omitted)); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556, 52 S. Ct. 457 (1932) (Judge Hand complaining that limiting instructions are "recommendations to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's").

Second, the trial court recognized that giving a limiting instruction was necessarily confusing in the circumstances. Defendant's admissions came into evidence in the State's case-in-

chief without objection as substantive evidence of his guilt.[18] The deputies' impeaching testimony had the same content regarding defendant's inculpatory admissions as their testimony on direct examination in the State's case-in-chief. The deputies' testimony went to the heart of the case, whether defendant was the person Deputy Cardon had seen fleeing. Instructing the jury at the end of trial[19] that it could not consider the deputies' rebuttal as substantive evidence, but only for its impeachment value, when the jury was also to be allowed to consider precisely the same testimony as evidence of defendant's guilt, would have been hopelessly confusing and fruitless.[20]

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[18] As noted above, at no point, either at trial or on appeal, has defendant challenged the admissibility of the deputies' testimony in the State's case-in-chief. Indeed, defendant does not even mention the deputies' direct testimony on appeal.

[19] The trial court also recognized that any value in a limiting instruction was greatly compromised by defendant's failure to request it at the time the deputies testified to his admissions during the State's case-in-chief. See United States v. Thirion, 813 F.2d 146, 155-56 (8th Cir. 1987) (a request for a limiting instruction should be timely and specific).

[20] Moreover, attempting to distinguish between substantive and impeachment use of the deputies' rebuttal testimony would have been illusory in narrow circumstances of this case. Defendant denied he was the fleeing motorcyclist. The deputies testified on rebuttal that he admitted he was the fleeing motorcyclist (R. 234-44). Given that the testimony of defendant and the deputies was in direct conflict, and given that the identification of the motorcyclist was central to determining culpability, the jury could only have considered the evidence substantively by weighing the credibility of the witnesses on this crucial point of identification. Indeed, substance and credibility are the same in these circumstances. Since the jury found defendant guilty, it is plain that they believed the deputies' testimony concerning his admissions, a necessary

4. Defendant's Reliance on Cases Dealing with the Introduction of Other Crimes is Inapposite to this Case.

In support of his argument that a limiting instruction must be given when evidence is admitted for a limited purpose, defendant cites cases dealing with the introduction of other crimes evidence. The State recognizes that evidence of other crimes is especially prejudicial because the jury may use it as evidence of propensity or may use it retributively to convict, entirely apart from the weight of other evidence in the case. State v. Newton, 743 P.2d 254, 256 (Wash. 1987). In such cases, an instruction to consider the evidence only for precisely what it is offered to prove may also be especially appropriate. State v. Johnson, 748 P.2d 1069, 1075 (Utah 1987).[21]

However, the deputies' rebuttal testimony in this case rebuttal was neither inherently prejudicial nor unrelated to the events at issue. Rather, the testimony concerned statements innocuous in themselves, but nonetheless incriminating because

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predicate to their verdict. Therefore, an instruction distinguishing the two possible uses of the deputies' rebuttal testimony would have been meaningless.

[21] In this same vein defendant also cites in support State v. Smith, 700 P.2d 1106, 1110 (Utah 1985) (limiting instruction should have been given where evidence of juvenile conviction admitted, but error not prejudicial); State v. Wellard, 3 Utah 2d 129, 279 P.2d 914 (Utah 1955) (no error where prior attempt to cash check properly admitted to show intent and limiting instruction given); and State v. Pierre, 572 P.2d 1338, 1351-52 (Utah 1977) (failure to limit jury's consideration of witness's inculpatory remark to codefendant only harmless error only). Appellant's Br. at 34-35.

they bore directly on the principal issue at trial, whether defendant was the observed motorcyclist. Thus, defendant was "prejudiced," not by unrelated events, but by his own admissions which amounted to a confession. Given this circumstance, coupled with the fact that a limiting instruction could only have confused the jury, the trial court did not abuse its discretion in refusing to give a limiting instruction.

C. Even if the Trial Court's Refusal to Give a Limiting Instruction was Error, it was Harmless Under the Circumstances.

"Harmless errors are 'errors which . . . are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings.'" State v. Villareal, 857 P.2d 949, 957 (Utah App. 1993), aff'd, 889 P.2d 419 (Utah 1995) (citing State v. Verde, 770 P.2d 116, 120 (Utah 1989)). "In other words, 'for an error to require reversal, the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict.'" Id. (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)). The burden is on defendant to show that any error was harmful, see e.g. State v. Beltran-Felix, 922 P.2d 30, 33 (Utah App. 1996), since any error in this case was not of constitutional dimension. See Isaac v. United States, 431 F.2d 11, 15 (9th Cir. 1970) holding any error in giving a challenged instruction to the effect that a witness's prior inconsistent statement might be

considered as substantive evidence and not solely for impeachment was not subject to the constitutional harmless-beyond-a-reasonable-doubt standard).

Even if this Court concludes there was error in the trial court's refusal to give a limiting instruction, that error is harmless for a variety of reasons. First, as discussed above, the impeachment testimony was merely redundant of properly admitted, unchallenged testimony given in the State's case-in-chief. See United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977) (per curiam) (admission of unrecorded prior inconsistent statement, even if improperly admitted, was not prejudicial where it was cumulative of another properly admitted prior inconsistent statement). Thus, a limiting instruction to consider the rebuttal only for impeachment purposes would not have affected the jury's consideration of the deputies' direct testimony given to directly prove defendant's guilt. Rather, such an instruction would only have confused the jury.

Second, there was substantial evidence of defendant's guilt. See Pierre, 572 P.2d at 1352 (error in failing to give requested limiting instruction not prejudicial where "there was such a plethora of direct and circumstantial evidence probative of defendant's guilt"). Deputy Cardon clearly and unhesitatingly identified defendant as the man on the motorcycle and defendant met the suspect's physical and sartorial description (R. 147,

151, 185, 143-44, 157).[22] In addition, defendant was ultimately discovered very close to the same spot where Deputy Cardon had first seen him (R. 154, 184). Deputy Cardon was also "a hundred percent sure" that defendant's motorcycle was the same one she had chased earlier (R. 156), the bike matched her initial description (R. 155), and Deputy Bruno noted it had a hot engine, despite the fact that defendant said he had been home all night and that no one else had used the motorcycle (R. 194-96, 200).[23] Finally, Deputy Cardon testified, during the State's case-in-

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[22] Defendant argues that "[t]he critical issue at trial was the reliability of Cardon's eye witness identification of the driver" of the motorcycle and claims that he "was prejudiced by the trial court's refusal to properly instruct the jury [concerning the rebuttal evidence] because the trial court's ruling allowed the jury to avoid having to weigh the eye witness identification evidence against the State's burden of proving its case beyond a reasonable doubt." Appellant's Br. at 37. Although defendant emphasizes that Deputy Cardon only caught brief glimpses of defendant's face, Deputy Cardon provided strong testimony positively identifying defendant as the suspect. She stated that she got a good look at defendant several times (R. 142, 143, 147), and that there was no question in her mind that defendant was the person she had been chasing (R. 157, 185). Given this compelling testimony, the jury could not have avoided weighing Deputy Cardon's identification. Indeed, the jury probably placed great weight on this evidence in favor of the State. "This Court is obliged to accept that version of the facts which the jury apparently believed and which supports the verdict." State v. Smith, 706 P.2d 1052, 1056 (Utah 1985). More importantly, the jury specifically received a cautionary instruction on eye-witness identification and the need to scrutinize such testimony (R. 62, Jury Instruction No. 17). Therefore, contrary to what defendant suggests, the jury was not only sure to weigh Deputy Cardon's identification of defendant as the perpetrator but was legally bound to weigh and evaluate it as well.

[23] Defendant later said that he had driven his car instead of his motorcycle. However, Deputy Bruno found that the car's engine was extremely cold (R. 197-98).

chief, that on the way to jail defendant said he was sorry for causing problems and claimed he led deputies on a chase because his wife in Toronto would not let him see his children (R. 158). There was thus a "plethora" of evidence supporting defendant's conviction.

Third, the clear purpose of recalling Deputies Bruno and Cardon as rebuttal witnesses was to impeach[24] defendant's immediately-preceding testimony that he was falsely identified (R. 222) and that he never made remarks acknowledging that he fled from Deputy Cardon (R. 224). Gardner, 789 P.2d at 282 (holding no manifest error in court's refusal to give limiting instruction where rebuttal testimony plainly offered only for limited purpose of impeachment).[25] When Deputy Bruno was recalled, defense counsel objected that the admissions had already been testified to in the State's case-in-chief (R. 235). The court overruled the objection, and stated, in the presence of the jury: "Mr. Bowman said that he didn't tell the deputies that, and Mr. Walsh (the prosecutor) is certainly entitled to use this

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[24] Defendant argues that even though the deputies' rebuttal testimony was offered only for impeachment, the prosecutor improperly argued the evidence substantively in closing. Appellant's Br. at 37 n.15. The argument fails to note that precisely the same evidence was admitted without objection in the State's case-in-chief (R. 158, 209-10), making the prosecutor's limited remarks (R. 283) entirely appropriate.

[25] See Verde, 770 P.2d at 121-22 (equating "manifest injustice" with "plain error" in most circumstances).

to contradict that" (R. 235). Based on these statements made by defense counsel and the court, the reappearance of Deputies Bruno and Cardon, the timing of the deputies' reappearance immediately following defendant's testimony, and the pointed questions posed to Deputies Bruno and Cardon about "what Mr. Bowman said about why he had run from the police," (R. 235, 241), it would have been obvious to the jury that the clear purpose of recalling Deputies Bruno and Cardon on rebuttal was to impeach defendant's testimony.

In sum, because (1) the limiting instruction requested by defendant would have been confusing and even meaningless, (2) there was substantial independent evidence of guilt, and (3) rebuttal testimony was clearly limited only to impeachment, any error in refusing to give the jury a limiting instruction was harmless.

POINT III

DEFENDANT'S CLAIM THAT THE PROSECUTOR IMPROPERLY COMMENTED ON HIS ABILITY TO SUBPOENA A WITNESS WAS NOT PRESERVED, LACKS MERIT, AND IN THE CIRCUMSTANCES OF THE CASE CONSTITUTES INVITED ERROR. ANY ERROR WAS AT MOST HARMLESS.

A. Defendant is Precluded from Raising this Issue on Appeal Because he Failed to Specifically State the Grounds for his Objection During the State's Closing Argument.

A timely and specific objection must be made in order to preserve an issue for appeal. See Utah R. Evid 103(a). "Where there [is] no clear or specific objection . . . and the specific

ground for objection [is] not clear from the context of the question or the testimony, the theory cannot be raised on appeal." State v. Schreuder, 726 P.2d 1215, 1222 (Utah 1986). The purpose of the waiver rule is to put the court on notice of the asserted error so that it can timely correct it, if need be. State v. Brown, 856 P.2d 358, 359-60 (Utah App. 1993).

In closing, defendant argued the inadequacy of the identification, inferring that the State did not call Kevin Mitchell to testify because he would not support Deputy Cardon's identification of defendant (R. 272). In rebuttal, the prosecutor explained the limited purpose of Mitchell's information, i.e., to explain the deputies' actions in going to defendant's and his parents' residences, and that if defendant thought he was so important a witness, defendant had every opportunity to bring him in (R. 280-81).[26] At that point defendant objected, explaining that he would have called Mitchell to testify, but did not because he assumed the witness would be present.[27]

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[26] The transcript of defendant's closing (R. 272-74) and the prosecutor's rebuttal (R. 280-82) is attached at Addendum C.

[27] Defense counsel's complete objection was as follows:

> "Objection to that, Judge. Of course, [Mitchell's] listed as a prosecution witness on the police reports, and if I'd have known he wasn't going to be here, I would have done that, but --"

That objection fails to inform the court that defendant was challenging the prosecutor's response on the ground that the prosecutor improperly invoked the "missing witness inference"[28] or that the comment shifted the burden to defendant to prove his innocence, errors asserted for the first time on appeal.

When the prosecutor, with the court's approval reiterated his earlier remarks, adding that defendant had the opportunity to subpoena Mitchell to expose the putative flaw in the State's case, defendant failed to object (R. 281-82). Given the complete lack of specificity in defendant's objection, this Court should refuse to consider the merits of defendant's claim. However, even if defendant's claim was preserved, it lacks merit.

B. Defendant Fails to Show that the Prosecutor's Comment Improperly Shifted to Him the Burden to Prove His Innocence.

"The test for determining whether a prosecutor's statements at trial constitute error is whether the remarks 'called to the jurors' attention matters which they would not be justified in considering in reaching a verdict.'" State v. Taylor, 884 P.2d 1293, 1296 (Utah App. 1994) (quoting State v. Emmett, 839 P.2d 781, 785 (Utah 1992)).

Defendant's principal argument is that the prosecutor

(R. 281).

[28] See State v. Smith, 706 P.2d 1052, 1057 (Utah 1985) (the missing witness inference permits the jury to infer that the testimony of an uncalled witness would have been unfavorable).

improperly shifted to him the burden to prove his innocence when he stated that defendant could have subpoenaed Mitchell. Appellant's Br. at 38-40.[29] Defendant relies primarily on Whitney v. State, 915 P.2d 881 (Nev. 1996), which states that "it is generally improper for a prosecutor to comment on the defense's failure to . . . call witnesses as such comment impermissibly shifts the burden of proof to the defense." Id. at 883 (holding that prosecutor's repeated referral to the defense's failure to produce a putatively significant witness prejudicial error. Id. at 882-83. However, Nevada's ready condemnation of prosecutorial use of the missing witness inference, without consideration of the prerequisites for invoking the inference, is out of step with Utah law. See State v. Thompson, 776 P.2d 48, 50 (Utah 1989) (finding prosecutor's reference to the defendant's failure to call a witness error because the witness was equally available to both parties, but harmless because the witness was not essential).

Dispositive of defendant's claim is State v. Smith, 706 P.2d 1052 (Utah 1985), wherein the defendant suggested that not he, but rather witnesses not called to testify by the State had

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[29] Defendant's argument is initially premised on the "missing witness inference," improperly invoked when the prosecutor suggested that if defendant thought Mitchell was such an important witness, defendant could have subpoenaed him (R. 281-82). The context of the claim plainly shows that any error on this subsidiary point was invited, as discussed below.

committed the offense. Id. at 1057. The trial judge interrupted the defense counsel and instructed the jury that "the State had no burden as relates to [those witnesses] in this case and the defendant had all of the rights of the State to bring them in," and told the jury to disregard what defense counsel had said. Id. The Utah Supreme Court rejected Smith's claim, stating "the judge's comment in no way implied that defendant had an affirmative duty to call witnesses or shifted the burden of production." Id. ("The judge's comment at most simply indicated that defendant could have called [the missing witnesses] had he believed that their testimonies were important, essential, or exculpatory."). Because the prosecutor's comment in this case states no more than the trial judge's in Smith, this Court should find defendant's claim without merit.[30]

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[30] Defendant asserts that the prosecutor's comment was an improper use of the "missing witness inference." Appellant's Br. at 39-40. However, the prosecutor's comment was merely made in response to defendant's improper invocation of that inference.

In Smith, the court discussed the prerequisites for invoking the "missing witness inference," to wit: "the defendant must establish that the missing witness was "peculiarly within the adversary's power to produce by showing either that the witness is physically available only to the opponent, or that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the opposing party." Id. 706 P.2d at 1057-58 (citation omitted) (defense counsel's comment about the state's failure to call the missing witnesses "was properly prohibited because "defendant elicited no shred of evidence to prove that [the witnesses'] testimony was unavailable to defendant and did not demonstrate that the witnesses "were peculiarly within the power of the state to produce"). Accord Thompson, 776 P.2d at 50 (finding prosecutor's invocation of the missing witness inference improper, though harmless, where the missing witness was "equally accessible to

C. Defendant's Argument Constitutes Invited Error.

In any event, even if the State's comment on defendant's ability to call Mitchell as a witness was arguably improper, this Court should reject defendant's argument because he invited any error.

"The doctrine of invited error 'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" State v. Perdue, 813 P.2d 1201, 1205 (Utah App. 1991) (quoting State v. Henderson, 792 P.2d 514, 516 (Wash. 1990)); accord State v. Dunn, 850 P.2d 1201, 1220 (Utah 1993). The purpose of this rule is to discourage a defendant in a criminal case from inviting prejudicial error and then implanting it in the record "as a form of appellate insurance against an adverse sentence." State v. Parsons, 781 P.2d 1275, 1285 (Utah 1989).

In State v. Tillman, 750 P.2d 546 (Utah 1987), during

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both parties").

In this case defendant has made no attempt to demonstrate, either at trial or on appeal, that Mitchell was peculiarly within the power of the State to produce as a witness or that his testimony was otherwise "unavailable." In fact, defense counsel admitted that, had he known the State was not going to call Mitchell as a witness, he would have called Mitchell himself (R. 281). Mitchell was thus equally accessible to both parties and defendant had all of the rights and powers of the State to subpoena him. In addition, defendant did not request a jury instruction on the missing witness inference, see Smith, 706 P.2d at 1057, obtain an advance ruling from the trial court before arguing to the jury for a missing witness inference, see Thompson, 776 P.2d at 50, and in fact waited until after the jury had been instructed and the prosecutor had argued the case to raise the absence of Mitchell. See Smith, 706 P.2d at 1058.

closing argument, defense counsel emphasized that the defendant would probably be a 67-year-old man when he got out of prison following a life sentence, "broken and old and incapable of causing damage to anyone." 750 P.2d at 559-60. In response, the prosecutor questioned whether defendant would be a better person fifteen years hence when he got out of prison given the lack of remorse he had shown during the trial. Id. at 560. Defendant then contended on appeal that the prosecutor's comments "were misleading and had the potential of improperly influencing its decision on the death penalty." Id.

In rejecting this argument, the Utah Supreme Court found it significant that "it was defense counsel who first commented that in Utah, parole is a possibility under a life sentence." Id. The court held that while the prosecutor's remarks "were arguably improper and prejudicial . . . , his comments, when placed within the context of his and defense counsel's entire arguments, fall within the ambit of permitted conduct." Id. The court concluded that "[i]nasmuch as defense counsel himself chose to initiate and argue [comments about the consequences of sentencing] and failed to object to the prosecutor's response to the same, he should be deemed to have invited the error (if there was any) and waived any objection." Id.

In this case, defense counsel's statements about the prosecution's failure to call Mitchell as a witness similarly

"opened the door to the prosecutor's remarks." Tillman, 750 P.2d at 560. The prosecutor, by referencing defendant's equal ability and opportunity to call Mitchell as a witness, was simply attempting to respond to and rebut defense counsel's previous statements. When placed within the context of the State's and defense counsel's entire arguments, the prosecutor's remarks "fall within the ambit of permitted conduct." In triggering rebuttal by the prosecutor, defense counsel invited any error.[31] Given the context of the prosecutor's response, this Court should

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[31] Defense counsel also failed to make a specific objection to the prosecutor's remarks and/or move for a mistrial on the grounds of prosecutorial misconduct. See Tillman, 750 P.2d at 561 (noting defense counsel failed to either object to the prosecutor's remarks or to move for a mistrial on the basis of prosecutorial misconduct).

Even if the prosecutor's statement was improper, it was not harmful. See Taylor, 884 P.2d at 1296 ("Only if the improper statements are deemed to be harmful will they require reversal.") (citing Emmett, 839 P.2d at 785); Tillman, 750 P.2d at 561 (no prejudice where prosecutor's rebuttal in closing merely a response issue raised by defense counsel and jury admonished to consider only evidence introduced at trial); see also State v. Thompson, 776 P.2d 48, 50 (Utah 1989) (if the jury was inclined to be influenced by the State's improper remarks, "the jury instructions that were given cured any potential error").

Similarly, the prosecution's rebuttal was not prejudicial since defense counsel had already brought up Mitchell's absence and, in fact, had admitted that he would have called Mitchell if he had known the prosecution would not. Moreover, as in Tillman and Thompson, the jury had been admonished not to consider either party's closing arguments as evidence and had been instructed, immediately prior to closing arguments, that the State bore the burden of proving defendant guilty beyond a reasonable doubt and that defendant had no burden whatsoever to put on evidence or call witnesses in his defense (R. 44-49, 59, 61, 62). Finally, given the substantial evidence supporting a conviction, see Point II(C) above, it is not reasonable to expect that the jury would have reached a different verdict if the State's remarks had been excluded by the trial court.

decline to review defendant's claim.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's convictions be affirmed.

RESPECTFULLY SUBMITTED this 11th day of April, 1997.

JAN GRAHAM
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF HAND-DELIVERY

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were hand delivered to Rebecca C. Hyde and Robin K. Youngberg, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 11th day of April, 1997.

ADDENDA

ADDENDUM A

JURY QUESTIONNAIRE - CRIMINAL CASE
THIRD DISTRICT COURT - JUDGE THORNE

NAME My Dang

CITY/COMMUNITY SLCC YRS IN SL COUNTY 6yrs

EDUCATION YRS COMPLETED 1993 HS DIPLOMA? YES / NO LOCATION _____

COLLEGE DEGREE 4yrs MAJOR Chem SCHOOL will transfer to U of U

OCCUPATION Assembly EMPLOYER Mountain tech Sales & Assembly

MARITAL STATUS ~~Female~~ (F) NUMBER OF CHILDREN 0 AGES 20

PREVIOUS SERVICE AS A JUROR? YES / (NO) WHERE? WHEN? _____

ARE YOU RELATED TO OR CLOSE FRIENDS WITH A LAW ENFORCEMENT OFFICIAL? YES / (NO)

NAME AND AGENCY _____

NAME AND AGENCY _____

HAVE YOU / A CLOSE FRIEND / FAMILY MEMBER EVER BEEN THE VICTIM OF A CRIMINAL OFFENSE? YES / (NO)

WHAT CRIME? _____

YEAR? ____ WHERE? _____

WHAT CRIME? _____

YEAR? ____ WHERE? _____

HAVE YOU / FAMILY MEMBER BEEN CHARGED WITH AN OFFENSE? YES / (NO)

IF SO, WHAT? _____ YEAR? _____ WHERE? _____

IF SO, WHAT? _____ YEAR? _____ WHERE? _____

IS THERE A REASON YOU WOULD BE UNABLE TO SERVE ON A JURY TODAY?

_____

I hereby swear that the above information is true _____

Date 1/13/96

JURY QUESTIONNAIRE - CRIMINAL CASE
THIRD DISTRICT COURT - JUDGE THORNE

NAME Frances Alires

CITY/COMMUNITY S.L.C. YRS IN SL COUNTY 30

EDUCATION YRS COMPLETED 12 HS DIPLOMA? YES / NO LOCATION _____

COLLEGE DEGREE no MAJOR _____ SCHOOL _____

OCCUPATION Inspector EMPLOYER Parker Packing

MARITAL STATUS Yes NUMBER OF CHILDREN 3 AGES 33 - 30 - 24

PREVIOUS SERVICE AS A JUROR? YES / (NO) WHERE? WHEN? _____

ARE YOU RELATED TO OR CLOSE FRIENDS WITH A LAW ENFORCEMENT OFFICIAL? YES / (NO)

NAME AND AGENCY _____

NAME AND AGENCY _____

HAVE YOU / A CLOSE FRIEND / FAMILY MEMBER EVER BEEN THE VICTIM OF A CRIMINAL OFFENSE? YES / (NO)

WHAT CRIME? _____

YEAR? ____ WHERE? _____

WHAT CRIME? _____

YEAR? ____ WHERE? _____

HAVE YOU / FAMILY MEMBER BEEN CHARGED WITH AN OFFENSE? YES / (NO)

IF SO, WHAT? _____ YEAR? _____ WHERE? _____

IF SO, WHAT? _____ YEAR? _____ WHERE? _____

IS THERE A REASON YOU WOULD BE UNABLE TO SERVE ON A JURY TODAY?

n/a

I hereby swear that the above information is true Frances Alires

Date 1-15-96

ADDENDUM B

MR. WALSH: May the other deputies be excused, Judge?

THE COURT: Anything--that's right. We'll excuse the witnesses.

Anything else that needs to be placed on the record?

MR. YOUNGBERG: Judge, I--I probably should just put this on the record, before you leave, Dave.

MR. WALSH: Lenny, you can leave if you want. Yes.

MR. YOUNGBERG: I did get a copy of the follow-up report today from the officer. That's the report in which this apparent questioning is mentioned, that the prosecutor got evidence of.

It appears that the questioning was done without Miranda rights, and so I would move that there be a--an instruction given to the jury that they should not consider that evidence. And I apologize for not bringing this up, you know, six months ago; but as I said, this is the first day we've seen this officer's report.

It appears to be a violation of his--of his Constitutional rights, Judge, in that he was not given his Miranda rights prior to the questioning and so I'd ask for a curative instruction.

THE COURT: Okay. Mr. Walsh?

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MR. WALSH: Judge, most of what is contained in that report, except what Deputy Bruno testified to, did not come out until rebuttal evidence, when the officer, Officer Bruno testi--or I mean Deputy Cardon; but the portion about the wife and the kids being in Canada, that was initially brought up when he testified, and then in response to that, I questioned him about it and then asked the officers to come in and impeach him. And for purposes of impeachment, whether there's Miranda or not, those statements are admissible.

Furthermore, Judge, I don't think there's--as the--as everybody's testified, this was not in response to any interrogation. Mr. Bowman was just ranting and raving and repeating himself over and over and over again.

THE COURT: Clearly, what Officer Cardon testified to was rambling; but Officer Bruno seemed to indicate that this may--very well may have been as a result of questioning after the arrest.

MR. WALSH: And that's what I say. It's significant, Judge, that after he's testified, if there is no Miranda, if there--even assume there is no Miranda, and a violation of the Miranda rights, the Court has said that doesn't give him the right to take the stand and lie, and so if there--if it's used for impeachment, and that's why I left it until the end, if it's used for impeachment, then

it's appropriate, whether there's Miranda or not.

THE COURT: Okay.

MR. YOUNGBERG: And just for the record, Judge, the officer's report does state, and I quote, "Mr. Bowman was asked why he ran. Mr. Bowman said that his wife won't let him see his kids, that she lives in Toronto."

Once again, Mr. Bowman was asked why he ran, and he stated that he was just acting out a life and that he was a wild man.

So, it does appear to be an interrogation. If that's what the prosecutor is offering it for, then we need an instruction in that--for that, saying that it's impeachment evidence only and it's not substantive evidence.

MR. WALSH: Well, and I beg to differ, Judge. If it's impeachment evidence, it can be--it's substantive evidence, and therefore, it comes in as substantive evidence of what he said at that time. You know, and that's why I left it to the end, I didn't bring it out on direct examination, the story about the kids and whatever, in Canada.

So, as I say, I mean, once he's taken the stand, whether there's a violation or not, he's not entitled to take the stand and lie. And so that's why the Supreme Court has held that if there's a violation of Miranda, if he testifies, then all--then he's fair game as to what he said.

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THE COURT: Mr. Youngberg, I understand the point that you're making. I'm not going to give the curative instruction. Let me state for the record a couple of reasons why.

One, I think Mr. Walsh is correct that the law makes that admissible; but two, I think that would draw the attention of the jury to the question, when I think that the case that the two of you have laid out for the jury is really a question of whether the officer did see the person or not.

And it's for those two reasons; first, I don't believe it's critical that they be instructed on that, and second, that it was admissible as it was presented.

Okay. Anything else that needs to be placed on the record?

MR. YOUNGBERG: No, Judge.

MR. WALSH: No, sir.

THE COURT: Are you ready to argue about it, gentlemen, or do you need a moment?

MR. YOUNGBERG: Yeah.

MR. WALSH: Don't need any time, Judge.

THE COURT: Okay. Let's bring them back then.

Gene, I'd ask you to hand out the jury instructions, if you would, please, sir.

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ADDENDUM C

And I hope you didn't take offense at the fact that I thought it was funny that she kept saying she was absolutely, positively sure, for sure, without any possible. blah-blah-blah, and what they're trying to say is, she's sure beyond a reasonable doubt, so you should be. I mean. let's just say what they're saying here. That's not the case. And as they say in Hamlet, the lady doth protest too much, methinks.

The fact that they're trying to convince you so hard makes me think that somewhere down inside there, that they aren't--that there is a question, because they see that this is not the best identification, so they're making a concerted effort to say, absolutely, positively, for sure, for sure, for sure.

Well, here's the problem with that. Kevin Mitchell is the problem with that. Kevin Mitchell is the reason why you should acquit this man today because he's the one that identified Scott Bowman.

Now, the Judge has instructed you before this that Kevin Mitchell's identification cannot be used for--to show that he's guilty of the crime. All it's supposed to be used for is to explain the officers' actions after that time. That's pretty hard for you to do, and I understand.

Kevin Mitchell comes up to the police officer after they've lost the motorcyclist. Even Deputy Cardon

said it was odd, and I think that's a good way to put it, it was odd. Kevin Mitchell, also known as Kelly, has a problem, there's bad blood between him and Mr. Bowman, for the reasons Mr. Bowman told you.

Kevin Mitchell should be here today to testify. He is supposedly, according to him, an eyewitness to this crime. There--rather than--than Deputy Cardon's few seconds of observation, the State should have produced Kevin Mitchell, the supposed witness, recall the State having the burden to prove the case. Kevin Mitchell should be here testifying. He's a witness.

Where was he standing? What is his reasons for lying? What does he look like? What kind of a motorcycle does he drive? The fact that he's--he's trying to be out to get Scott and is he mistaken, for crying out loud? Did he see the motorcycle shoot by him at 90 miles an hour and say, there's that son-of-a-gun Scott Bowman that I hate? I mean, we can't tell that, and that's why the Judge has instructed you not to use his identification evidence to convict, only to explain the officers' movements.

But I would--I would argue to you that the State has a responsibility to present these evidence--this evidence and that it was not presented and that that alone is enough to show a reasonable doubt in this case, because it's evidence that we need to make the--a decision on all

the facts, not just the facts that the prosecution wants you to hear.

Interesting to consider the witness' demeanor, too. If you recall, everybody on the stand has an interest in the case and I think it's kind of--I would argue it's ludicrous to say that an officer doesn't care whether or not that--they win a case or not, that's why they sit there all day, that's why they put them on the stand, like they're kinda like the plaintiff and he's kinda like the defendant.

Of course they have a motive, not necessarily to lie, but a motive to be successful, to see that their arrests are--are upheld and that sort of thing, which is one reason we don't allow the police to decide who's guilty of a crime, that's why we have juries, because--because they are not unbiased observers. If they were, we would just allow them to decide this case; right? That's why you're here in this jury box and the rest of us are outside of it.

Now, Deputy Cardon was given information by this absent witness, Kevin Mitchell. She was given a name and we don't know what all, description.

It's unclear from the evidence today when Bruno received his information, if that was part of the Mitchell information, or if it was strictly Deputy Cardon's observations; it's just not clear.

What I would--what happened in this case is that

you my boss' number if you want and you can complain about me, but--but please, look at the case without me there if there's something that I've done that's bothered you.

Second of all, take the time necessary to go through this--this case, this is a serious enough case, both the State and--and Mr. Bowman have the right to have you take this seriously and to--and to spend the time necessary to deliberate, although as I said before, it is a simple case in a lot of ways.

I hate to sit down here because I know I'm going to forget--I'm going to remember that I didn't say something, but at this point, the case is yours, you hold this man's life in your hand, and I would ask--would pray that you look at the evidence and that you find him not guilty of this charge.

Thank you very much.

THE COURT: Mr. Walsh, you have about ten minutes left on your time.

MR. WALSH: Thanks, Judge.

I have an opportunity to respond to some of those items that Mr. Youngberg raised.

He mentions to you, why isn't Kevin Mitchell here, why didn't the State produce him? Well, let me tell you what Mr. Mitchell--you've seen what he provides, he just told us where--or at least the officers, where--who this

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person was and where that person lived. That's all he's necessary for us to have, and we could have all other--three other officers and everybody else that was involved, we could have brought in the person that was stopped down farther by--through Granite, the other person on the motorcycle; but that's not essential for our case.

And so if Mr. Bowman--or if Mr. Youngberg thinks he's such an important witness, although he has no responsibility to produce any evidence, he has every opportunity to bring him in and let you hear from him. So, if he wanted you to hear from him, he has that opportunity--

MR. YOUNGBERG: Objection to that, Judge. Of course, he's listed as a prosecution witness on the police reports, and if I'd have known he wasn't going to be here, I would have done that, but--

MR. WALSH: Well, I'll object to him insinuating that I knew he wasn't going to be here.

THE COURT: Well, I don't think that's what he did. He simply--Counsel indicated that if you wished him to testify, you could have brought him; so, I'll overrule the objection.

MR. WALSH: Thank you, Judge.

So, if--if that's such a big deal to Mr. Youngberg, he has every opportunity to bring in everybody he wants, he has the subpoena power of the Court and so he

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wants you to think, boy, that's a big flaw in the State's case. That's no flaw in the State's case, all the evidence and all the information that he provided, you heard from the--from Deputy Cardon.

You know, there's another interesting piece of evidence--two other interesting pieces of evidence that you should consider in deciding yes, that this was Mr. Bowman. Where did this person go? When he was fleeing the police officer, where did he go?

He went, you recall Officer Cardon that from there to the back wall, he was that close to being home. He was that close. He was within, what, 40 to 60 feet, somewhere in that vicinity. You'll recall that the apartment was this close to the business where Mr. Bowman went behind. So he went home.

And that's what you would expect somebody who's almost home at night, he's--whatever he's doing, but he's almost home, you would expect that to happen. Why didn't he stay? Because the officer was right there.

And so when the officers, with their lights and sirens show up, hey, he's got--he can't go home immediately and so he takes off and goes back down the very same path that he had come from. So, that's an interesting piece of evidence which indicates that whoever it was who was fleeing knew right where he was, knew that there was a little

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